APPENDIX "A"

OPINIONS AND FINDINGS

in the

UNITED STATES COURT OF CLAIMS

No. 270-52

(Decided February 12, 1959)

General Outdoor Advertising Co., Inc.

v. *United States*

WHITAKER, *Judge*, delivered the opinion of the court:

This controversy arose under this court's Rule 38(c), concerning the amount of tax which plaintiff is entitled to recover under our previous decision in this case, reported in 137 C. Cls. 607. In that opinion we held that the Commissioner of Internal Revenue had erroneously reduced the value of plaintiff's land and buildings. However, we also held that the claim for refund based upon this erroneous valuation was not an amendment of the original claim, but rather an independent claim, from which it follows that plaintiff can only recover the payments of tax made within two years prior to the date it was filed, which was April 3, 1950. Section 322(b) of the Internal Revenue Code of 1939 permits recovery if "the tax was paid" within two years of the filing of the claim for refund.

The question presented is the date a remittance of $225,000 and interest by the taxpayer in August 1947 shall be credited as a tax payment on account of the taxpayer's liability for additional taxes for 1944. This remittance was made prior to any assessment or a notice of a deficiency from the Commissioner on account of such liability, but after receipt of the revenue agent's report recommending the assessment of a larger deficiency.

The Government says this was a voluntary payment by

the taxpayer of an amount of additional tax which it admitted it owed for that year, and must be considered as the payment, in August 1947, of taxes due for 1944, although no assessment of additional taxes had been made at that time.

The plaintiff, on the other hand, says that the remittance in 1947 was merely "on account", or a deposit, in anticipation of an assessment, to take care of one when made, and that the subsequent assessment in October 1947 was of no effect, because: (1) the plaintiff was not given a deficiency notice ninety days before the assessment, as provided by section 272(a)(1) of the Internal Revenue Code of 1939; and (2) because the assessment list was not signed by the Commissioner personally, but by an agent, who, under authority from the Commissioner, had signed the Commissioner's name thereto. Hence, it says the assessment was void, from which it follows there was no assessment to which the remittance of $225,000 could be applied, and that it could not lawfully be applied in part settlement of plaintiff's tax liability for 1944 until the amount of that liability had been determined. That determination was in 1948, within two years of the filing of the claim for refund.

In May 1947 an internal revenue agent examined plaintiff's tax returns for the years 1941, 1942, 1943, and 1944. For the year 1944, the only year involved here, the agent's report showed a net deficiency in excess profit tax of $316,377.04. A copy of this report was furnished plaintiff with a letter dated July 23, 1947, which enclosed a form for "waiver and acceptance" and one for acknowledgment of receipt of the report with an expression of the taxpayer's position with respect to it, but the letter stated that this was "not a final notice of deficiency."

Plaintiff did not execute the form for waiver and acceptance, but it did execute the form headed "Receipt of

Revenue Agent's Report." This form first acknowledged receipt of the report, and then read:

> The position of the undersigned with respect to the disposition of the findings disclosed by the report is indicated by a check mark:
>
> 1. Revenue Agent's findings are agreed to..... ☐
>
> (a) Signed Agreement Form 874 is enclosed herewith ..... ☐
>
> (b) Signed Agreement Form 874 has already been forwarded to your office..... ☐
>
> (c) Payment of any deficiency in tax indicated above has already been made to Collector of Internal Revenue (in part —not protested) ..... ☒
>
> (d) Payment of any deficiency in tax indicated above will be made to the Collector of Internal Revenue upon receipt of notice and demand, and no objection will be made to the immediate assessment of the tax..... ☐
>
> 2. Revenue Agent's findings are not agreed to... ☒
>
> 3. Protest will be filed within the alloted time... ☒
>
> 4. I do not intend to protest these findings..... ☐

By this the taxpayer said it did not agree with the agent's report in full, and that it meant to file a protest, but not to the report in its entirety, but only in part, and that it was enclosing check in part payment.

The document was enclosed in a letter of the same date, which read in part:

> * * * Part of the net tax will be made the subject of a Protest to be filed with the agent in charge.
>
> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by mak-

ing a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.

Enclosed also were two checks, one for $225,000 on account of the 1944 tax deficiency, and the other for $33,750 as accrued interest.

Upon receipt of these checks, the collector charged them to its 9-D unclassified collection account, since at that time there was no unpaid assessment for 1944 against plaintiff to which the payment could be credited. About two months later, on October 10, 1947, without the plaintiff's knowledge, an assessment for the year 1944 of $225,000 as excess profits tax and $32,625 as interest, computed to August 15, 1947, was duly certified under the signature of Commissioner Schoeneman. The list was in fact signed by an employee in the office of the Commissioner, who had been previously authorized in writing by Mr. Schoeneman to sign Mr. Schoeneman's name to such lists. About a month after the assessment, on November 14, 1947, the sums were transferred by the collector from his 9-D account and credited against the assessment of October 10, 1947. This was more than two years before the claim for refund was filed.

A refund of $1,125.00, as an overpayment of this assessment, was the first actual notice plaintiff had of this assessment. This was in April 1948.

Plaintiff first contends that the October 10 assessment was invalid, because notice of the proposed assessment was not given, as provided by section 272(a)(1), *supra*. That section provides as follows:

> *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner deter-

> mines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such a proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

The purpose of this section is to allow a taxpayer to contest in the Tax Court a deficiency in tax which the Commissioner has found to be due, prior to payment. But, if the taxpayer states that he does not care to contest it, of course the notice need not be sent, since it is sent only to permit a contest in the Tax Court, and the assessment may be made forthwith. Here the taxpayer stated it meant to protest the action proposed by the revenue agent only in part, and sent its check for $225,000 in part payment of the asserted liability of $316,377.04. Five days later, it filed its protest against two alleged errors of the revenue agent. Thus, by its statement that it meant to protest the payment only in part, and by its payment of the amount of $225,000 on account of the proposed deficiency, the taxpayer admitted liability for $225,000 of the proposed deficiency.

In such circumstances the Commissioner of Internal Revenue was justified in making the assessment of the $225,000

and in satisfying it with plaintiff's remittance of that amount. As to that amount plaintiff waived the notice required by section 272(a)(1). Cf. *Lehigh Portland Cement Co.* v. *United States*, 90 C. Cls. 36.

The plaintiff's second contention is that the assessment is void because the Commissioner did not sign it personally. There is no statutory requirement that he do so. Section 3901(a)(1) provides that the Commissioner of Internal Revenue shall have "general superintendence" of the assessment and collection of all taxes. 26 U.S.C. § 3901 (1952 ed.). Anyone at all acquainted with the magnitude of the task of making assessments of internal revenue taxes knows that Congress by the use of the words "general superintendence" did not intend the Commissioner to act personally on all collections and assessments. All assessments are made in his name, but he does not make them himself, but through subordinates. Nor need he himself sign the assessment lists, of which there are many, many thousands. As the trial commissioner points out in finding 4, if the Commissioner of Internal Revenue was required to sign such documents personally, he would have but little, if any, time for his other duties. Such signing may be done by the Commissioner personally, or his name may be subscribed by another under his direction. See *Christopher* v. *Commissioner*, 55 F. 2d 530.

It follows, therefore, that the October 10, 1947, assessment and the subsequent application thereto of the remittance of $225,000 were valid, and the April 3, 1950, refund claim as to that amount is barred by the two-year statute of limitations.

However, the refund claim is valid as to the 1944 and 1945 taxes which were assessed and paid after April 3, 1948. On this account plaintiff is entitled to recover a net overpayment for 1944 of $60,460.47; and a net overpayment for

1945 of $48,221.41. Judgment shall be entered for $108,681.88, with interest as provided by law.

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation; LARAMORE, *Judge*, MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner George H. Foster, and the briefs and argument of counsel, makes findings of fact as follows:

1. Under date of May 26, 1947, a revenue agent made an examination of plaintiff's returns for the years 1941, 1942, 1943, and 1944. A copy of the report was furnished plaintiff by the agent with a letter dated July 23, 1947, which inclosed a form for "waiver and acceptance" and a form of "acknowledgment." The report proposed adjustments for the years 1941, 1942, and 1943, as well as 1944. The years 1941, 1942, and 1943 are not herein involved. For the year 1944 there was a proposed deficiency of $419,193.64 in excess profits tax and an overpayment of income tax of $102,816.60. The net deficiency for 1944 was $316,377.04. The letter stated that it was "not a final notice of deficiency and this office will be pleased to answer any questions which may occur to you in your examination of the inclosed copy of the report." The letter also stated that if plaintiff failed to file either a waiver and acceptance of the inclosed form or a written protest, within a thirty-day period, a final determination would be made and a notice of deficiency would be sent in accordance with the provisions of law applicable to the assessment and collection of deficiencies.

The report indicated that the principal cause of the change in the tax liabilities was adjustments of depreciation and excess profits credit which adjustments had been discussed with plaintiff's attorney who did not agree thereto.

The basis of disagreement was stated in the report as follows:

> The taxpayer has agreed to all adjustments made in this report with the exception of the amount determined to be the distributions in prior years out of accumulated earnings and profits.

2. Under date of August 14, 1947, the plaintiff returned the acknowledgment form with a letter to the collector of internal revenue at Chicago with reference to the year 1944. The letter stated that "part of the net tax will be made subject of a Protest to be filed with the agent in charge." The letter continued:

> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by making a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.
>
> By reason of adjustments effective with the years 1942, -43, -44, a deficiency in tax will occur in 1945, and an amended return for 1945 is in the course of preparation and will be submitted to you at an early date. A tax deficiency for 1945 of approximately $150,000.00 at least is estimated. Accordingly, please find enclosed herewith another check in your favor to cover the expected tax deficiency for 1945 of $150,000.00 together with interest in the amount of $13,500.00 also covered by separate check payable to your order.

The acknowledgment form indicated that a part of the deficiency in tax determined by the revenue agent, which was not protested, had already been paid to the collector and a protest would be filed in the allotted time. Inclosed in the letter were the four checks for the amounts indicated. Plaintiff did not sign the form of waiver and acceptance.

3. Plaintiff filed a protest dated August 19, 1947, against the adjustments made in the revenue agent's report as follows:

(1) The agent failed to allow as a deduction for each of the years 1942, 1943 and 1944, respectively, the sums of $3,448.05, $3,973.50 and $4,498.45, which are Pennsylvania State Franchise tax, deductible in the year of liability. The tax accrues for payment on March 15 of each year following year of liability. It is believed that the agent merely overlooked these items in the final windup of his report. The figures can be supported and correction should be made.

(2) In determining equity invested capital for excess profits tax purposes, the agent erred in computing the amount of distributions made prior to the current taxable year (in each instance) not out of accumulated earnings and profits. The agent refers to this issue on page 4 of his report and taxpayer's position is outlined in letter dated May 21, 1947, prepared and submitted to you by its attorney, Mr. Glass. Such letter may be referred to by you as taxpayer's brief in support of the protest of this item.

A hearing before the Conference Section of your office is hereby requested and you are asked to notify its attorney, Spaulding F. Glass, c/c Lord, Bissell & Kadyk, 135 South LaSalle Street, Chicago 3, Illinois of the time for such hearing.

The questions raised in the protest of August 19, 1947, were later referred to the Bureau of Internal Revenue in Washington for a ruling.

4. Upon receipt of the checks, the collector credited his 9-D Unclassified Collection account on August 15, 1947, in the amount of the proceeds of the checks. At that time there were no unpaid assessments for the years 1944 and 1945, against which to credit the payment.

Thereafter, in due course of time, an assessment list was prepared upon which an assessment against the plaintiff in the amount of $225,000 of excess profits tax, together with interest of $32,625 computed to August 15, 1947, for the year 1944 was listed. This assessment list was certified on October 10, 1947, as having been determined to be due from plaintiff over the name of George J. Schoeneman, the then Commissioner of Internal Revenue. The name George J. Schoeneman was not placed thereon by Mr. Schoeneman. It was signed by an employee in the office of the Commissioner who had been previously authorized, in writing, by Mr. Schoeneman to sign Mr. Schoeneman's name to such lists. The practice of the signing by authorized persons had existed for many years prior to the time that Mr. Schoeneman was appointed commissioner and continued throughout his holding of that position. This practice grew out of the volume of documents requiring the signature of the commissioner, which was so great that had the commissioner personally signed, he would have had little or no time for anything else.

5. On November 14, 1947, the sums of $225,000 and $32,625 were transferred by the collector from the 9-D account and credited against the assessments of October 10, 1947. Subsequently an amount equal to the difference between the $33,750 sent in by plaintiff, as interest, and the sum of $32,625, assessed as interest, was considered as an overpayment. A refund of $1,125 was made to plaintiff in April 1948, with interest thereon for seven months and five days, amounting to $40.30.

6. The questions raised in the protest were not settled until sometime in April 1948. However, on December 5, 1947, plaintiff executed a consent agreement, extending the time for assessment for the year 1944 to December 31, 1948. The agreement was signed on behalf of the Commissioner

on December 16, 1947, in the same manner as described in finding 4. The final determination for the year 1944 was made in April 1948. On April 22, 1948, plaintiff executed a waiver of the restrictions on assessment and collection for the year 1944 with respect to an excess profits tax deficiency of $308,699.83. This waiver was received by the revenue agent on April 27, 1948. This amount was later reduced to $308,493.20. Inasmuch as $225,000 with interest of $32,625 has been placed on the October 10, 1947 assessment list, the difference between $308,493.20 and $225,000, namely $83,493.20, was thereupon placed on an assessment list, together with $16,028.41 as interest thereon. This assessment list was certified on behalf of the Commissioner of Internal Revenue in a same manner as described in finding 4.

7. The payment of the assessment of $83,493.20 and the interest was accomplished by credits of $22,116.42 and $62,786.59 on August 24, 1948, and the payment on September 2, 1948, of $14,618.60.

8. On an assessment list certified on December 10, 1948, in the same manner, described in finding 4, there was assessed against plaintiff for the year 1945 a deficiency of excess profits tax of $341,767.06, together with interest to September 12, 1948, in the amount of $40,323.40. There was a valid waiver of time applicable to this assessment. This excess profits tax deficiency with the interest thereon was paid as follows:

$13,500.00: Transferred January 17, 1949, from 9-D account.

$150,000.00: Transferred January 17, 1949, from 9-D account.

$21,345.20: Transferred February 16, 1949, from 9-D account.

$150,000.00: Transferred February 16, 1949, from 9-D account.

$33,239.09: Paid December 31, 1948.

$13,798.04: Credit January 5, 1949.

$208.13: Abated July 1, 1949.

The amount of $13,500 transmitted as a payment against estimated interest on the estimated tax deficiency for 1945, was, when transferred from the 9-D account, used to pay in part the deficiency and interest on the December 10, 1948 assessment.

9. A recomputation of the tax liability for the year 1944, based on the decision of March 6, 1957, shows an overpayment of excess profits tax of $254,901.53 with interest thereon of $40,882.62, and a deficiency in income tax of $119,252.17.

The amounts paid by the plaintiff within two years prior to the filing of the claim for refund on April 3, 1950, of the excess profits tax are $83,493.20 together with the interest thereon of $16,028.41. The amount of $83,493.20 of the excess profits tax is 32.75508 percent of the total overpayment. A similar percentage of the deficiency of income tax is $39,061.14. The net overpayment for 1944 amounts to $60,460.47.

10. A recomputation of the tax liability for the year 1945, based on the decision of March 6, 1957, shows an overpayment of excess profits tax of $74,239.34 with interest thereon of $8,713.92, and a deficiency in income tax of $34,731.85, leaving a net overpayment for 1945 of $48,221.41.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a mat-

ter of law that plaintiff is entitled to recover. It is, therefore, adjudged and ordered that plaintiff recover of and from the United States the amount of one hundred eight thousand six hundred eighty-one dollars and eighty-eight cents ($108,681.88), with interest as provided by law.

APPENDIX "B"

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * *

* * * * *

(d). *Waiver of restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period Of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the lated. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

• • • • • •

(26 U.S.C. 1952 ed., Sec. 322.)

APPENDIX "C"

The Legislative History of Section 272(d), Internal Revenue Code of 1939.

In order to place the entire issue in its proper framework of reference, two things should be remembered. First, Section 272 of the 1939 Internal Revenue Code is the direct descendant of Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. Second, Section 274 of the Revenue Act of 1924, was added to the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[1] That is, Section 274 of the Revenue Act of 1924 was a procedural section which established the procedure by which a taxpayer invoked the jurisdiction of the Board of Tax Appeals. The terms of Section 274 of the Revenue Act of 1924 are set forth below in toto.[2]

1. "Section 274(a): This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." H. R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

2. Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

A reading of Section 274 of the Revenue Act of 1924 reflects that if the Commissioner determined a deficiency in tax, the taxpayer "shall" be notified of such deficiency by registered mail. After receipt of the notice of deficiency, the taxpayer was then given 60 days to file an appeal with the Board of Tax Appeals. Thereafter, if the Board determined a deficiency; the amount so determined shall be assessed and paid upon notice and demand. On the other hand, if the Board disallowed the deficiency or part of it, the collector could not assess as to that amount, but he could without assessment, begin a proceeding in court for the collection of any amount so disallowed by the Board.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time

Under the above procedure, both the Commissioner and the taxpayer would appear before the Board to present their cases. If a decision was in favor of the Commissioner, the tax could then be assessed, and the taxpayer was left to his remedy in the courts for a recovery of the tax.[3] If that decision was in favor of the taxpayer, the Commissioner could not assess the tax, but was left to his remedy in the courts in a suit to collect the alleged additional tax due.[4]

---

as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

3. H.R. Rep. No. 1, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 315, 321).

4. H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 247).

However, there was no provision in Section 274, Revenue Act of 1924, whereby a taxpayer, who did not intend to appeal to the Board of Tax Appeals, could stop the running of interest after the day the notice of deficiency was issued until the Commissioner assessed the tax sometime after the 60 day period had expired. Section 274(c), Revenue Act of 1924, *supra*. Thus, a taxpayer was required to pay a minimum of 60 days extra interest simply because of a procedural block which prohibited the Commissioner from assessing the tax even though the taxpayer might have decided not to appeal to the Board of Tax Appeals.

Therefore, in 1926, Congress took up the problem and adopted the first waiver provision in the form of Section 274(d),[5] and said in explanation thereof, speaking through the Senate Finance Committee:[6]

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board.* It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Emphasis supplied)

In other words, Section 274(d), Revenue Act of 1926,

5. "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.

6. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

granted a right to the taxpayer, but without taking away any right to take the case to the Board. Since Section 274 (a), Revenue Act of 1926, provided that a taxpayer cannot appeal to the Board until he has received a statutory notice of deficiency, it is obvious that the new waiver subsection only applied after the taxpayer had received the notice of deficiency. This is the only conclusion possible in view of the Senate Finance Committee statement that Section 274(d), Revenue Act of 1926, permitting waivers, does not take away the right of the taxpayer to appeal to the Board. Clearly, the above-quoted language of the Senate Finance Committee shows that the waiver provisions of Section 274(d), Revenue Act of 1926, were designed to relieve the taxpayer from paying interest on an asserted deficiency, after a notice of deficiency was issued, for the 60-day period within which an appeal could be taken to the Board.

In view of the above-quoted explanation, by the Senate Finance Committee, of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co.* v. *Poe, supra*, that waivers filed before the issuance of a notice of deficiency were premature and powerless to prevent the Commissioner's resort to a notice of deficiency, and said, at page 907:

> "... If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied)

Possibly this understanding was one of the reasons why Judge Sawtell also said, at pages 906-907:

> "Section 274(a), supra, (26 USCA 1048), contains the initial and important condition, "if in the case of

> any taxpayer the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section."

Nor was it unexpected that the *Mutual Lumber Co.* v. *Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co.* v. *Commissioner*, *supra*, wherein Judge Garrecht said, at page 621:

> "It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, *is premature and therefore invalid.* In Mutual Lumber Co. v. Poe, 66 F. 2d. 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . ." (Emphasis supplied)

Following the *Mutual Lumber Co.* v. *Poe*, and *McCarthy v. Commissioner* cases, *supra*, and because these were the only decided cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was taken up in 1938 by a Subcommittee on Ways and Means.

The report[7] issued by this Subcommittee stated:

> "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906 certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amend-

7. Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess. on Proposed Revisions of the Revenue Laws 1938.

ment to what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

> " . . . to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right, at any time after a deficiency is proposed in any manner that the Commission may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed."

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d), Internal Revenue Code of 1939 (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[8] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[9] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[10] This language was designed to overcome the

8. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

9. Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

10. Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote 53 at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

Mutual Lumber Co. v. *Poe* and *McCarthy* v. *Commissioner* cases, *supra*, holding that waivers to be valid under Section 272(d) of the 1939 Internal Code must be preceded by the issuance of a statutory notice of deficiency.[11]

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co.* v. *Poe*, *supra*, and *McCarthy* v. *Commissioner*, *supra*, correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said the waiver section did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Furthermore, Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means

11. *Ibid.*

Committee that the Ninth Circuit had held such waivers invalid, and it had seen Section 2604 of the Internal Revenue Administrative Code proposed by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the 1939 Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Respondent submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code is strong support of the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Court said it meant in the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra*. Also when this later legislative history is considered in the light of the language of the original Senate Finance Committee report which introduced the same statutory language found in Section 272(d) of the 1939 Internal Revenue Code, it is difficult to see how one could support a contention that the *Mutual Lumber Co.* v. *Poe* and *McCarthy* v. *Commissioner* cases, *supra*, should be overruled unless those cases holding contra (*Moore* v. *Cleveland Ry. Co.*, *supra*, and *Associated Mutuals, Inc.* v. *Delaney*, *supra*.) are better reasoned or are based on statutory language which is clear and unambiguous.